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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 42

UNITED STATES OF AMERICA,
Petitioner,

v.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, and as Liquidator of the Domesticated United States Branch of First Russian Insurance Company Established in 1827; VICTOR YERMALOFF, and others.

ON A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY.

AMICUS CURIAE BRIEF ON BEHALF OF CERTAIN RECEIVERS UNDER SECTION 977-b OF THE NEW YORK CIVIL PRACTICE ACT

FREDERICK H. WOOD,
ALBERT RAY CONNELLY,
Of Counsel.

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No. 42

BRIEF ON BEHALF OF

IRWIN STEINGUT and HAROLD E. BLODGETT, as Receivers of the assets in New York of Russo-Asiatic Bank;

JOHN R. CREWS, as Receiver of the assets in New York of Petrograd Metal Works;

ELMER F. QUINN, as Receiver of the assets in New York of Vladikavkazsky Railway Company;

JOHN H. THOMPSON, as Receiver of the assets in New York of Petrograd Trading Bank;

THOMAS I. SHERIDAN and JULIUS SCHOR, as Receivers of the assets in New York of Volga Kama Commercial Bank; and

HARRY BIJUR, as Receiver of the assets in New York of Northern Insurance Company of Moscow,

As *Amici Curiae.*

CONSENT OF PARTIES

This brief is submitted upon the written consent of the parties to this appeal, filed with the Clerk of this Court. The Receivers in whose behalf the brief is filed have been appointed by court orders pursuant to Section 977-b of the Civil Practice Act of New York and are parties to pending actions which involve the questions discussed herein.

OPINIONS BELOW

The memorandum opinion of the Supreme Court of the State of New York, New York County, is not reported. The judgment based thereon was unanimously affirmed without opinion by the Appellate Division of the Supreme Court for the First Judicial Department (259 App. Div. 871). The *per curiam* opinion of the New York Court of Appeals, affirming the judgment below, is reported in 284 N. Y. 555.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925 [28 U. S. C. §344(b)].

SUMMARY OF ARGUMENT

The decision of the New York Court of Appeals does not present a federal question subject to review by this Court.

1. The New York court has held that the Soviet decrees relied upon by petitioner did not purport to confiscate assets in New York of the United States branch of a Russian insurance company and do not affect the disposition of such assets.

2. Neither the interpretation of foreign law by the New York court nor its decision as to the application of such foreign law raises a federal question.

ARGUMENT

THE DECISION OF THE NEW YORK COURT OF APPEALS DOES NOT PRESENT A FEDERAL QUESTION SUBJECT TO REVIEW BY THIS COURT.

1. The New York court has held that the Soviet decrees did not purport to confiscate assets in New York and do not affect the disposition of such assets.

The courts of the State of New York have held that the Soviet decrees relied upon by petitioner did not purport to confiscate assets in New York of the United States branch of a Russian insurance company and do not affect the disposition of such assets. The courts below have so held in this case and, in so doing, have followed the decision in *Moscow Fire Ins. Co.* v. *Bank of New York*, 280 N. Y. 286, aff'd without opinion, 309 U. S. 624, rehearing denied, 309 U. S. 697.

The *per curiam* opinion of the Court of Appeals in this case expressly states that the court applied the same rules of law which were applied in its decision in the *Moscow* case. The facts considered in the *Moscow* case are substantially the same as the facts herein. In the *Moscow* case, the United States Government, intervener, appealed to the Court of Appeals from a judgment, rendered after a trial of the issues, dismissing on the merits its petition asserting title to surplus funds in New York of the Moscow Fire Insurance Company. The claim of the United States, as the assignee of the Soviet government under the Litvinov assignment, was based upon the Soviet decrees nationalizing Russian insurance companies and confiscating their assets.

The Court of Appeals held in the *Moscow* case (1) as a matter of construction, that the Soviet confiscatory decrees did not purport to apply to assets in New York of the United States branch of a Russian insurance corporation; (2) as a matter of conflict of laws, that rights to property in New York belonging to the United States branch of a Russian insurance corporation are dependent, not upon the law of Russia, but upon the law of New York; and (3) that under the law of New York, upon the termination in Russia of the corporate existence of the Russian insurance corporation, its residual rights to property located in New York passed to its stockholders and creditors and not to the Soviet government.

In arriving at that decision, the Court of Appeals (per Lehman, *J.*) thus analyzed the problems involved (pp. 302-303):

> "The rights of the United States are derived solely from the assignment by the Soviet government of its claims against nationals of the United States. The claims of the Soviet government for the moneys or property in this country, of Moscow Fire Insurance Company are based solely on its decrees of nationalization of insurance companies and of seizure of their assets. The United States asserts here title to property of a branch in this State of a Russian insurance corporation which it is said was transferred, by force of these decrees, from the insurance corporation to the Russian government. Two questions arise: *first*, whether the Russian decrees were intended to have such effect, and, *second*, whether, even if so intended the courts of this State will give them their intended effect.
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> * * * * * * * *
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> "The question then of the construction of the Soviet decrees is a question of the law of Russia to be

> determined like other questions of foreign law, upon the testimony of expert witnesses, decisions of the foreign courts or officers authorized to promulgate or authoritatively construe the foreign law, and upon the relevant documents. The question of the *effect* to be given to the foreign law within this State by the courts of this State must be determined in accordance with the law of this State. * * *".

With respect to the construction of the Soviet decrees, the court reviewed the findings of the referee that "the decrees were not intended to apply to the property in this State of the United States branch of Moscow Fire Insurance Company" and held that, notwithstanding the testimony of an expert witness to the contrary, "the findings of the referee are fully sustained by the evidence" (p. 306).

The court then considered whether, even if the Soviet decrees were intended to apply to property with situs in New York, the courts of New York should give such decrees their intended effect and concluded that rights to property in New York belonging to the United States branch of a Russian insurance company are dependent, not upon the law of Russia as formulated in the Soviet decrees, but upon the law of New York. On this point the court said (pp. 307-310):

> "Certainly no decree monopolizing the business of insurance in Russia; taking over the conduct of the insurance business formerly conducted in Russia by insurance corporations, and terminating the obligations of such companies could possibly have been intended to apply to business conducted here, or if so intended, could be binding here. * * *
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> * * * * * * * *

> "The findings or conclusions of the courts below that the decrees of nationalization of insurance were not intended to have effect here and that title to and right to possession of the capital of the United States branch of the insurance company is dependent upon the law of this State, rest upon a firm foundation."

The court then examined the law of New York to determine who, under that law, was entitled to share in the distribution of the assets of the United States branch of the Moscow Fire Insurance Company and concluded that, in the situation here presented, the residual rights of the nationalized Russian corporation passed to its stockholders and creditors, and not to the Soviet government. The court said (p. 314):

> "The courts, giving effect as they must to the extinction of the parent company, must determine whether the parent company's residual right to property here passes by confiscatory decree to the sovereign who extinguished the parent corporation or whether under the law of this State such rights have passed to the stockholders and foreign creditors who, in answer to an invitation extended to them by this State, have come in and proven their claims in accordance with a procedure devised by this court to 'conform to justice and equity' as those terms are understood here. The courts below have made the proper choice, not because enforcement of confiscatory decrees of property situated elsewhere is contrary to our public policy, but because under the law of this State such confiscatory decrees do not affect the property claimed here."

The decision in the instant case rests upon the identical grounds on which the decision in the *Moscow* case was based. In this case, precisely the same questions were presented.

Paragraph 8 of the complaint alleges that the Soviet decrees nationalized the assets "of every kind and wheresoever situated of all Russian insurance companies" (R. 23). The answer denied each and every allegation of paragraph 8 of the complaint, except the issuance of the decrees (R. 38). In addition, the separate defense was pleaded that the confiscation was operative only within Russia, and that the Soviet government itself has recognized that the nationalization and confiscatory decrees were intended only to confiscate property within the territorial limits of Russia and not to extend to property outside of such territorial limits (R. 46-47). Paragraph 10 of the complaint alleges that, as a result of the Soviet decrees, the assets in New York of the insurance company become the property of the Soviet government (R. 24). The answer denied such allegations (R. 37).

In the affidavit submitted by respondent in support of its motion for summary judgment dismissing the complaint, it is stated that "the facts in the *Moscow* and the instant cases are parallel" and that the "Soviet decrees involved are also the same" (R. 15). Such statements were not controverted in petitioner's opposing affidavit, which asserted merely that in view of the then pending application to this Court for certiorari to review the decision of the New York Court of Appeals in the *Moscow* case, the dismissal of the complaint in the instant case was premature (R. 50-51).

The Court at Special Term granted the motion for summary judgment solely on the authority of the *Moscow* case (R. 52), and in affirming the judgment below, the Court of Appeals relied exclusively upon the *Moscow* decision (R. 71).

As was pointed out in the *Moscow* decision, the Soviet government has itself recognized in various promulgations that the confiscatory decrees here in question purported to confiscate only the property physically located within the territorial limits of Russia, and did not purport to confiscate property located outside of such territorial limits. In its answer filed in this case, respondent has specifically cited several of such promulgations, including Decision No. 124 of October 16, 1924, by the Third Department of the People's Commissariat of Justice, interpreting the decree of November 18, 1919, on the annulment of life insurance contracts. It was held in that Decision that "the general annulment of agreements of life insurance does not extend to the territories located without the borders of the U. S. S. R., and particularly to the United States of North America" (R. 47).*

*The other promulgations of the Soviet government specifically mentioned in the respondent's answer herein are Circular No. 42, dated April 12, 1922, of the People's Commissariat for Foreign Affairs; Circular No. 194, dated September 26, 1923, of the People's Commissariat of Justice; and Circular No. 329, dated October 23, 1925, of the People's Commissariat for Foreign Affairs (R. 47).

Circular No. 42 states that:

> "The Law on Property established by the decrees of the Russian Soviet Government does, therefore, determine only legal relations pertaining to property rights as arise on the territory of the R. S. F. S. R. Legal relations pertaining to property rights whereof the subject matter is situated outside the territory of the R. S. F. S. R. and is not connected with such territory cannot be governed outside the territory of the R. S. F. S. R. by Russian Law and are—irrespective of the nationality of the persons entitled to such rights, be they even Russian citizens—subject to the effects of Local Law.";

Circular No. 194 states that:

> "Proprietary rights of citizens of the R. S. F. S. R. enforceable outside the R. S. F. S. R. are governed by the laws of the country where they are to be enforced.".

There is no decision of this Court or of the New York courts holding, after a trial of the issue, that the Soviet decrees did purport to confiscate such property located in New York. In *United States* v. *Belmont*, 301 U. S. 324, the question before the Court was whether or not the District Court had erred in granting a motion to dismiss the complaint for failure to state a cause of action. For the purposes of that decision on the pleadings, it was admitted that, as alleged in the complaint (301 U. S. at p. 326), the Soviet decrees had nationalized the assets, wherever located, of Russian nationals, including the relevant bank deposit.

Similarly, in *United States* v. *Manhattan Co.*, 276 N. Y. 396, the complaint also alleged (276 N. Y. at p. 399) that the Soviet decrees had nationalized the assets, wherever located, of Russian nationals, including the assets in New York there in question, and on a motion to dismiss the complaint for insufficiency the Court of Appeals said that (p. 399) "every fact set forth in the complaint must be deemed to be true". Thus, in neither the *Belmont* case nor the *Manhattan* case was there a finding based upon evidence that Soviet decrees did purport to confiscate assets in New York of Russian nationals.

With respect to the holding herein that, in any event, rights to property in New York belonging to the United States branch of a Russian insurance corporation are dependent, not upon the law of Russia, but upon the law of New York, it has long been settled that such rights are necessarily to be determined with reference to the laws of the state in which the property is located, and that rights in such property predicated upon foreign law will not be recognized or enforced where the effect of enforcement

would be to exclude creditors or would be otherwise contrary to the public policy of the state.

As was pointed out by Mr. Justice (now Chief Justice) Stone in his concurring opinion in *United States* v. *Belmont*, 301 U. S. 324, 334, 335, this Court has often recognized that a state may refuse to give effect to a transfer, made elsewhere, of property which is within its own territorial limits, if the transfer is in conflict with its public policy, or where the subject of the transfer is a chose in action due from a debtor within the state to a foreign creditor, and, further, that:

> "* * * it is a recognized rule that a state may rightly refuse to give effect to external transfers of property within its borders so far as they would operate to exclude creditors suing in its courts. *Harrison* v. *Sterry, supra* [5 Cranch. 289]; *Security Trust Co.* v. *Dodd, Mead & Co., supra* [173 U. S. 624]; *Disconto Gesellschaft* v. *Umbreit, supra* [208 U. S. 570]; *Clark* v. *Williard, supra* [294 U. S. 211]; *Barth* v. *Backus, supra* [140 N. Y. 230]."

Barth v. *Backus*, 140 N. Y. 230, one of the cases cited in the foregoing quotation, stated the policy of the State of New York on this point at an early date. It was held in that case that title to property in New York which was acquired by an involuntary assignment under the laws of another state would not be recognized by the New York courts when asserted against the rights of creditors pursuing a remedy against the property in New York, even if such creditors are not residents of New York but are residents of the state wherein the involuntary assignment was made.

Also, in the recent case of *Griffin* v. *McCoach*, 313 U. S. 498, 506, 507, this Court (per Mr. Justice Reed) has said, in discussing a situation involving the full faith and credit clause:

> "Rights acquired by contract outside a state are enforced within a state, certainly where its own citizens are concerned; but that principle excepts claimed rights so contrary to the law of the forum as to subvert the forum's view of public policy. Cf. *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 110; 120 N. E. 198. It is 'rudimentary' that a state 'will not lend the aid of its courts to enforce a contract founded upon a foreign law where to do so would be repugnant to good morals, would lead to disturbance and disorganization of the local municipal law, or in other words, violate the public policy of the State where the enforcement of the foreign contract is sought.' *Bond* v. *Hume*, 243 U. S. 15, 21. * * *
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> * * * * * * * * *
>
> "* * * It is for the state to say whether a contract contrary to such a statute or rule of law is so offensive to its view of public welfare as to require its courts to close their doors to its enforcement."

The conclusion of the court in the instant case that under New York law no rights in the New York assets passed to the Soviet government by virtue of the confiscatory decrees is supported not only by the consideration mentioned in the *Moscow* case, but also by legislative expression of the policy of the State of New York. By Section 977-b of the Civil Practice Act*, the New York Legislature

*Section 977-b was construed and held to be constitutional in *Oliner* v. *American-Oriental Banking Corporation*, 252 App. Div. 212, aff'd without opinion, 277 N. Y. 590.

has set up a comprehensive scheme for the liquidation of assets in New York of corporations which have been nationalized in their domiciliary country or countries. Provision is made in Section 977-b for the appointment of a receiver of such assets, for the investigation of claims, for the payment of creditors, and for the disposal of the surplus to stockholders or others who may be entitled thereto. Subdivision 19 of Section 977-b provides, *inter alia*, that

> "* * * such * * * nationalization, * * * in the country of its domicile, or any confiscatory law or decree thereof, shall not be deemed to have any extra-territorial effect or validity as to the property * * * of such corporation within the state * * *."

It is therefore submitted that the decision of the instant case is clearly correct and, if jurisdiction of the cause should be assumed by this Court, the judgment of the state court should be affirmed. It is also submitted, however, that the decision of the New York court does not present a federal question subject to review by this Court.

2. No federal question is presented by the decision of the New York court.

Petitioner invokes the jurisdiction of this Court under Section 237(b) of the Judicial Code, as amended [28 U. S. C. § 344(b)], which provides that:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, * * * any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in

> which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; * * *."

It is undisputed that in this case no question has been raised concerning the validity of any statute of the United States or of the State of New York. And we are not concerned with the question whether the Litvinov assignment is a treaty within the meaning of Section 237(b) of the Judicial Code, because under the Litvinov assignment the Soviet government assigned to the United States government only "* * * the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, * * *" (R. 36a, 36c). By the terms of that assignment, the United States government received only the amounts admittedly due, or thereafter found to be due, the Soviet government, and this Court has held that by virtue of that assignment the United States government received only the rights possessed by the Soviet government at the time of the assignment *United States* v. *Belmont*, 301 U. S. 324, 335-37; *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 141.

As the New York Court of Appeals stated in the *Moscow* case (280 N. Y. 286, 304):

> "'There is nothing * * * to suggest that the United States was to acquire or exert any greater rights

than its transferor or that the President by mere executive action purported or intended to alter or diminish the rights of the debtor with respect to any assigned claims, or that the United States * * * is to do more than the Soviet government could have done after diplomatic recognition—that is, collect the claims in conformity to local law. Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them.' (*Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 143.) The United States has not invoked the judicial authority of the States in aid of an agreement it has consummated, calculated to give the decrees of the Soviet government force beyond the force given to decrees of other recognized governments. It invokes the aid of the court only to enforce rights of the Soviet government, whatever they might be, which the United States has acquired by assignment, to property within this State and subject to the law of the State."

In determining the claims of the Soviet government which are here asserted by the United States, the New York court has decided (a) that such claims were dependent upon New York law and (b) that under New York law, such claims were invalid.

On the latter point it is, of course, not open to question that no federal question is presented, for the decision of the highest court of a state is conclusive as to the law of that state. *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64; *Neblett* v. *Carpenter*, 305 U. S. 297, 302.

The only possibility of a federal question must, therefore, lie in the decision that the claims of the Soviet government to property located in New York were dependent upon

New York law. As heretofore pointed out, that decision rests upon alternative grounds:

> (1) That there was no foreign law applicable to the claims, inasmuch as the Soviet decrees did not purport to affect property in New York; and
>
> (2) That under the circumstances here presented, rights to the property in question must be determined on the basis of New York law and not Russian law.

It is submitted that neither alternative ground of the decision presents a federal question.

The decision that the Soviet confiscatory decrees did not purport to affect assets in New York of the United States branch of a Russian insurance company was a determination of a question of fact, *i.e.*, the interpretation of foreign law, and it has long been settled that no federal question is presented by an allegedly erroneous interpretation of foreign law by a state court. *Phillips* v. *Mound City Association*, 124 U. S. 605; *Western Indemnity Co.* v. *Rupp*, 235 U. S. 261, 275. *Cf. Hanley* v. *Donoghue*, 116 U. S. 1, 4-6; *Aetna Life Ins. Co.* v. *Dunken*, 266 U. S. 389, 394; *Grayson* v. *Harris*, 267 U. S. 352, 357, 358.

Even if, however, the state court had found that the Soviet decrees did purport to confiscate assets in New York and had rested its decision solely upon the ground that under the circumstances here presented rights to the property in question must be determined upon the basis of New York law and not Russian law, its decision would be merely a decision as to the New York rules of conflict of laws, and such a decision does not present a federal question under the due process clause of the Fourteenth Amendment to the

Constitution of the United States. *Kryger* v. *Wilson*, 242 U. S. 171. See *Bradford Elec. Co.* v. *Clapper*, 286 U. S. 145, 154; *Aetna Life Ins. Co.* v. *Tremblay*, 223 U. S. 185, 190; *Griffin* v. *McCoach*, 313 U. S. 498, 507; *Pacific Employers Insurance Co.* v. *Industrial Accident Comm'n*, 306 U. S. 493, 500; *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, 498.

The *Kryger* case involved a federal jurisdictional question arising under the due process clause. In that case the North Dakota courts had held that contract rights which arose in Minnesota to real property in North Dakota had been canceled by proceedings under North Dakota law. This Court affirmed the decision of the North Dakota courts and held (per Mr. Justice Brandeis) that doctrines of the conflict of laws are a part of the body of the common law, and an allegedly erroneous decision by a state court upon a point of conflict of laws does not raise a federal question under the due process clause of the Constitution of the United States. The authority of that case remains unimpaired in a situation wherein it is claimed that the due process clause has been violated by a conflict of laws decision of a state court refusing to enforce rights predicated upon the laws of a foreign government.*

As was said in *Bradford Elec. Co.* v. *Clapper*, 286 U. S. 145, 154:

> "If the conflict presented were between the laws of a foreign country and those of New Hampshire, its [the New Hampshire] courts would be free, so

*It must be remembered that in *United States* v. *Belmont*, 301 U. S. 324, and in *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, this Court reviewed decisions of the Second Circuit Court of Appeals, and not decisions of the New York Court of Appeals.

> far as the restrictions of federal law are concerned, to attach legal consequences to acts done within the State, without reference to the undertaking of the parties, entered into at their common residence abroad, that such consequences should not be enforced between them. * * *"

Therefore, even if it had been found that the Soviet decrees purported to confiscate for the benefit of the Soviet Government the assets in New York of a New York branch of a Russian insurance company, and if the decision below rested solely on the ground that rights arising in that manner are unenforceable under New York law, no question would be presented to this Court for review.

It is not necessary, however, to consider in this case the problems which would be presented if the decision below rested only on that ground. The decision of the court below can be rested on the independent and adequate non-federal ground that the Soviet decrees did not purport to affect the assets in question, and under such circumstances this Court should not take jurisdiction to review the decision of the New York court. *Fox Film Corp.* v. *Muller*, 296 U. S. 207; *Lynch* v. *New York*, 293 U. S. 52; *Fuchtel* v. *Wilson*, 204 U. S. 36; *Johnson* v. *Risk*, 137 U. S. 300. As was said in *Lynch* v. *New York*, *supra*; (at pp. 54-55):

> "It may be surmised, from the quotations in its opinion, that the Appellate Division intended to rest its decision upon a determination of the application of the Fourteenth Amendment, and that the affirmance by the Court of Appeals went upon the same ground, and not upon the non-federal ground of the application of the Constitution and laws of the State. But jurisdiction cannot be founded upon

surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record.

"It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. * * * Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction."

It is submitted, therefore, that the decision of the New York court in this case does not involve a federal question which is subject to review by this Court.

Respectfully submitted,

FREDERICK H. WOOD,
ALBERT RAY CONNELLY,
Of Counsel for certain Receivers, as amici curiae.